



IN THE NORTH WEST HIGH COURT, MAHIKENG

CASE NUMBER: M427/2016A

In the matter between:

**FOODCORP (PTY) LTD t/a
SUNBAKE RUSTENBURG**

APPLICANT

And

RUSTENBURG LOCAL MUNICIPALITY

RESPONDENT

DATE OF HEARING : 25 APRIL 2017

DATE OF JUDGMENT : 18 MAY 2017

COUNSEL FOR THE APPLICANT : ADV. STOPES SC

COUNSEL FOR THE RESPONDENT : ADV. LAUBSCHER

JUDGMENT

DJAJE AJ

Introduction

- [1] The Applicant seeks a declaratory order against the Respondent for the business electricity tariff increase of 0.27c alternatively R0.27kWh for the whole of **2015/2016** financial year to be declared invalid and set aside. This order sought by the Applicant is a final relief.

Background

- [2] The Respondent is a licence holder supplying electricity to consumers within its area of jurisdiction, the Applicant included. The licence is issued by the Regulator being the National Energy Regulator of South Africa (“*NERSA*”) in terms of section 7 of the Electricity Regulation Act 4 of 2006 (“*Electricity Act*”). In terms of section 15(2) of the Electricity Act a licensee may not charge any other tariff other than that determined or approved by the Regulator as part of its licensing conditions.
- [3] NERSA published a notice in the Government Gazette on **20 February 2015** about tariff increase for the year 2015/2016. The notice stated that:

“NERSA approved the Municipal Tariff Guideline increase of 12.20% and the Benchmarks for the 2015/16 municipal tariff review process on 29 January 2015. The municipal tariff guideline increase and

benchmarks will be implemented on 01 July 2015 and they meant to assist municipalities in preparing their tariff reviews. It is important to note that this guideline is not an automatic increase in tariff and that licensees are still required to apply to the Energy Regulator for approval of their tariffs in accordance with the provisions of Section 15(2) of the Electricity Regulation Act, 2006 (Act No. 4 of 2006) before implementation. Licensees applying for an above-guideline increase will have to justify the increase to the Energy Regulator. The Decision and Reasons for Decision (R/D) documents have been published on the NERSA website at www.nersa.org.za.”

- [4] In **April 2015** the Respondent made an application for the commercial tariff increase to NERSA which was approved on **1 July 2015**. The approved tariff increase was at R0.27/kWh. In supplying electricity, the Respondent levied the Applicant for business rate reliability service charge at R0.27/kWh from **1 July 2015**. On **21 August 2015** NERSA corrected its approval of the Respondent's application from R0.27/kWh to 0.27c/kWh.

Issue

- [5] The issue to be determined is whether NERSA had made a determination on or before **15 March 2015** of an upper limit increase in terms of section 43 of Municipal Finance Management Act 56 of 2003 (“MFMA”) which the Respondent could impose from **July 2015**.

Submissions

- [6] It was submitted by the Applicant that municipalities are only entitled to charge tariffs approved by NERSA and where NERSA determines an upper limit before 15 March, municipalities can only impose the increased tariffs from the **1st July** in the same year. In this matter the Applicant argued that publication of **20 February 2015** by NERSA does not constitute a determination as envisaged in section 43 of the MFMA. It is the Applicant's contention that the notice dated **20 February 2015** is a guideline on the increase and does not fix an upper limit as it states that municipalities may not simply increase their tariffs on the strength of the notice but must still make applications to NERSA even if it's lower than the published guideline. It is on this basis that the Applicant submitted that there was no determination and the Respondent could only apply the increase approved in **July** and **August 2015** from **July 2016**.
- [7] In its argument counsel for the Applicant rightfully referred to case law dealing with the meaning of determination. Reference was made to the matter of **Mars Inc. v Cadbury (Swaziland) (Pty) Ltd & Another 2000 (4) SA 1010 (SCA)** at paragraph 10 where Harms JA held that *"the primary meaning of determine is to put an end to or settle and decide a question"*. **See also: Public Carriers Association & Others v Toll Road Concessionaries (Pty) Ltd & Others 1990 (1) SA 925 (A) at 948/949.**
- [8] In opposing the application the Respondent argued that there is a clear difference between the *"determination"* in terms of section

43(1) of the MFMA and the “*determination or approval*” in terms of section 15(2) of the Electricity Act. It was argued that the promulgation of **20 February 2015** by means of Notice 134 of 2015 in Government Gazette No 38478 was a determination as referred to in section 43(1) of the MFMA. Further that it was made before **15 March 2015** and as such could take effect from **1 July 2015**. Thereafter the Respondent was obliged to apply to NERSA for “*determination or approval of **their** specific electricity tariff for the financial year **2015/2016***”.

- [9] Counsel for the Respondent argued that a close reading of the notice dated **20 February 2015** refers to “*NERSA approved the Municipal Tariff Guideline increase of 12.20% and the Benchmarks for the 2015/16 municipal tariff review process on 29 January 2015*”. It was argued that this is an indication that on **29 January 2015** a decision was taken by NERSA to approve an increase of 12. 20%. This decision was then promulgated in the Government Gazette. Counsel submitted that the word “*determination*” had not been used in the notice but that does not change the effect of the notice and that it does comply with section 43(1) of the MFMA. Further that the effect of the notice is that it is a decision which is conclusive and authoritative.

Law

- [10] Section 43 (1) and (2) of MFMA states that:

“ (1) *If a national or provincial organ of state in terms of a power contained in any national or provincial legislation determines the*

upper limits of a municipal tax or tariff, such determination takes effect for municipalities on a date specified in the determination.

(2) *Unless the Minister on good grounds approves otherwise, the date specified in a determination referred to in subsection (1) may-*

(a) if the determination was promulgated on or before 15 March in a year, not be a date before 1 July in that year; or

(b) if the determination was promulgated after 15 March in a year, not be a date before 1 July in the next year.”

[11] In terms of section 15 (2) of the Electricity Act:

“A licensee may not charge a customer any other tariff and make use of provisions in agreements other than that determined or approved by the Regulator as part of its licensing conditions.”

Analysis

[12] The process of tariff increase by municipalities is regulated by the MFMA and the Electricity Act in sections 43(1) and 15(2) respectively. As provided for in section 43(1) of the MFMA the regulator in this case NERSA, must make a determination of the upper limit increase which will be imposed in July of the year in which it is made if made before **15 March**. Section 15(2) of the Electricity Regulation Act then makes provision for approval of tariffs increase to a licensee. This requires section 15(2) to be read with section 43(1) of the MFMA. These are two separate legislations regulating the electricity tariff increase by municipalities and should both be given effect. The section in the MFMA cannot

be imposed without consideration of section 15(2) of the Electricity Act. The objects of the Electricity Act are stated in section 2 as:

- “(a) achieve the efficient, effective, sustainable and orderly development and operation of electricity supply infrastructure in South Africa;*
- (b) ensure that the interest and needs of present and future electricity customers and end users are safeguarded and met, having regard to the governance, efficiency, effectiveness and long-term sustainability of the electricity supply industry within the broader context of economic energy regulation in the Republic;*
- (c) facilitate investment in the electricity supply industry;*
- (d) facilitate universal access to electricity;*
- (e) promote the use of diverse energy sources and energy efficiency;*
- (f) promote competitiveness and customer and end user choice; and*
- (g) facilitate a fair balance between the interests of customers and end users, licensees, investors in the electricity supply industry and the public.”*

This clearly refers to regulation of electricity supply in general.

[13] Section 43(1) of the MFMA refers to “*determines*” and section 15(2) of the Electricity Regulation Act refers to “*determined or approved*”. The two sections clearly have different functions. Section 43(1) of MFMA is dealing with a determination only whereas section 15(2) of the Electricity Regulation Act deals with approval.

These are distinctively separate functions. It therefore means that after a general determination is made in terms of section 43(1) of the MFMA there must be an approval in terms of section 15 (2) of the Electricity Act of the specific tariff increase per municipality.

- [14] The issue in this matter is whether there was a determination by NERSA of the upper limit and thereafter an approval in terms of section 15(2) of the Electricity Act. The notice dated **20 February 2015** refers to NERSA having approved a tariff guideline increase on **29 January 2015**, this was then promulgated in a Government Gazette. The simple meaning of promulgate in the **South African concise Oxford Dictionary** is “*promote or make widely known; put (a law or decree) into effect by official proclamation*” It is unimaginable that NERSA which is a national organ of state would make promulgation in a Government Gazette which does not have the effect of being decisive. Therefore, the only meaning that can be attached to the promulgation of **20 February 2015** is that it was a determination or decision by NERSA of the upper limit as required by section 43(1) of the MFMA. This determination was done before **15 March 2015** and therefore the Respondent could apply its tariff increase from **July 2015** for the financial year **2015/2016**. It is unfortunate that the promulgation does not make use of the word “*determines*” which would be in line with the provisions of section 43(1) of the MFMA. However the purport of the notice is similar to a determination.

[15] In the said notice of **20 February 2015** reference is made to the municipalities required to apply to the Energy Regulator for approval of **their** tariffs in accordance with the provisions of section 15(2) of the Electricity Act before implementation. A close reading of this portion of the notice clearly indicates that reference is made to the individual municipalities to apply for approval of **their** own specific increase. This is separate from the determination of 12.20% which is general. The Respondent did comply with this portion of the notice by applying to NERSA for approval of the tariff increase which was approved on **1 July 2015** and rectified on **21 August 2015**.

[16] The Applicant in the notice of motion prays for “*an order declaring the respondent’s purported tariff increase and determination of the business rate reliability service charge of 0.27c alternatively R0.27/kWh for the 2015/2016 annual period invalid and set aside*”. This is based on the understanding by the Applicant that the Respondent had not complied with the provisions of MFMA and the Electricity Act or confusion between the functions of the applicable legislations. In my view there was compliance with section 43(1) of the MFMA in that NERSA on **20 February 2015** promulgated its decision on the limit increase which is interpreted to be a determination. Thereafter the Respondent applied for their tariff increase which was approved by NERSA. The Respondent was entitled to levy the Applicant the business rate reliability tariff increase as approved by NERSA for the year **2015/2016** from **July 2015**.

[17] Having considered the submissions made, I am of the view that the Applicant has not made out a case against the Respondent and the application should be dismissed with costs.

Order

[18] Consequently, the following order is made:

1. Application is dismissed with costs.

DJAJE AJ
ACTING JUDGE OF THE HIGH COURT